Construction and General Laborers Union, Local 185, Laborers International Union of North America, AFL-CIO; Cement Masons Local 582, Operative Plasterers and Cement Masons International Association, AFL-CIO *and* West-Cal Construction, Inc. Cases 20-CC-2157 and 20-CC-2158

March 18, 1981

DECISION AND ORDER

On September 26, 1980, Administrative Law Judge David P. McDonald issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. Respondents have filed a motion to strike the General Counsel's exceptions and brief and the General Counsel filed a response requesting that Respondents' motion be denied.[1]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to substitute for the Administrative Law Judge's recommended Order, the following Order and notices.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Construction and General Laborers Union, Local 185, Laborers International Union of North America, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Picketing West-Cal Construction, Inc., for the purpose of requiring West-Cal to enter into the 1977-80 Laborers' Master Agreement governing subcontracting of construction site work.

(b) Picketing West-Cal's Gate 2 (Halyard Street) in Sacramento so long as that gate is reserved for the exclusive use of secondary or neutral employers or persons and their employees, with an object of forcing or requiring West-Cal's neutral subcontractors to cease doing business with West-Cal.

2. Take the following affirmative action:

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix A."[4] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by an authorized representative of Respondent Laborers Union, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Laborers Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and deliver to the Regional Director for Region 20 sufficient copies of said notice, to be furnished by the Regional Director, for posting at the premises of West-Cal, if willing.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

B. Respondent Cement Masons Local 582, Operative Plasterers and Cement Masons International Association, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from picketing West-Cal's Gate 2 (Halyard Street) in Sacramento, so long as that gate is reserved for the exclusive use of secondary or neutral employers or persons and their employees, with an object of forcing or requiring such neutral subcontractors to cease doing business with West-Cal in order to force or require West-Cal to cease doing business with G & L Concrete.

2. Take the following affirmative action:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B."[5] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by an authorized representative of Respondent Cement Masons Union, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where no-

[1] Respondents' motion to strike the General Counsel's exceptions and brief is predicated on the grounds that they are defective in both form and specificity required by Sec. 102.46(b) and (c) of the Board's Rules and Regulations. We find no merit in Respondent's motion and hereby deny it.

[2] In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's findings and conclusions that Respondent Laborers violated Sec. 8(b)(4)(A) and 8(b)(4)(B) and that Respondent Cement Masons violated Sec. 8(b)(4)(B).

The General Counsel points out, correctly, that the Administrative Law Judge erroneously stated that the complaint alleged a violation of Sec. 8(e). Moreover, we note that the Administrative Law Judge did not find, in his Decision or his Conclusions of Law, that either Respondent violated Sec. 8(e). Hence, we shall eliminate par. A(1)(a) from the Administrative Law Judge's recommended order.

[3] We find merit in certain exceptions filed by the General Counsel to the Administrative Law Judge's recommended Order and notice. These exceptions are directed to conforming the Order to the Administrative Law Judge's findings and conclusions and the issuance of separate notices. Hence, we shall conform the Order and notices to the Administrative Law Judge's substantive legal findings to which no exceptions have been filed. See fn. 2, *supra*.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[5] See fn. 4, *supra*.

tices to members are customarily posted. Reasonable steps shall be taken by Respondent Cement Masons Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and deliver to the Regional Director for Region 20 sufficient copies of said notice, to be furnished by the Regional Director, for posting at the premises of West-Cal, if willing.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten, coerce, or restrain West-Cal Construction, Inc., by picketing at the construction site on the property located at Starboard Street and Halyard Drive, Sacramento, California, where an object thereof is to force or require West-Cal to enter into an agreement which is prohibited by Section 8(a) of the Act, as amended.

WE WILL NOT, by picketing or otherwise, induce or encourage any employee of any person engaged in an industry affecting commerce to refuse in the course of his employment to work or perform services where an object of such union conduct is to force or require any person to cease doing business with West-Cal Construction, Inc., at the construction site on the property located at Starboard Street and Halyard Drive, Sacramento, California.

CONSTRUCTION AND GENERAL LABORERS UNION, LOCAL 185, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT, by picketing or otherwise, induce or encourage any employee of any person engaged in an industry affecting commerce to refuse in the course of his employment to work or perform services where an object of such union conduct is to force or require any person to cease doing business with West-Cal Construction, Inc., or require West-Cal to cease doing business with G & L Concrete, at the construction site on the property located at Starboard Street and Halyard Drive, Sacramento, California.

CEMENT MASONS LOCAL 582, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO

DECISION

STATEMENT OF THE CASE

DAVID P. MCDONALD, Administrative Law Judge: This case was heard before me at Sacramento, California, on November 1, 1979, pursuant to an order consolidating cases, consolidated complaint and notice of hearing issued on July 10, 1979, by the Regional Director of the National Labor Relations Board for Region 20. The complaint is based upon original charges filed on June 26, 1979, and July 9, 1979,[1] by West-Cal Construction, Inc., hereinafter called West-Cal. The complaint alleges violations of Sections 8(e), 8(b)(4)(i) and (ii)(A), and 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, hereinafter called the Act. Counsel for Respondents filed answers on behalf of his clients, Construction and General Laborers Union, Local 185, Laborers International Union of North America, AFL-CIO, hereinafter called Laborers Union; and Cement Masons Local 582, Operative Plasterers and Cement Masons International Association, AFL-CIO, hereinafter called Cement Masons Union, on July 12, 1979.

All parties were afforded full opportunity to examine and cross-examine witnesses, to introduce relevant evidence, and to present oral argument.[2] The counsel for General Counsel and West-Cal timely filed their briefs.

Upon the entire record in this case, the briefs of the parties, and my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

West-Cal, a California corporation with an office and place of business in Hacienda Heights, California, has been engaged in the building and construction industry as a general contractor. During the past calendar year, West-Cal, in the course and conduct of its business operations, received gross revenues in excess of $5 million and purchased and received in California products,

[1] Unless otherwise specified all dates herein refer to the calendar year of 1979.

[2] Although counsel for Respondents had entered his appearance on behalf of his clients, Laborers Union and Cement Masons Union, neither he nor his clients appeared at the hearing. Counsel did not request a continuance nor did he provide an explanation as to his or his clients' absence. After waiting 2 hours, the hearing began at 11 a.m.

goods, and materials valued in excess of $50,000 directly from suppliers located outside the State of California.

Upon the foregoing, I find that at all times material herein West-Cal has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondents, Laborers Union and Cement Masons Union, each admit individually, and I find that, at all times material herein, they were labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues in this proceeding are whether Laborers Union and Cement Masons Union violated Section 8(b)(4)(i) and (ii)(A), and/or (B) of the Act. Specifically, the question raised by the complaint is whether the picketing by Respondent Laborers in support of its demand that West-Cal entered into a memorandum agreement binding it to the Laborers 1977–80 Master Agreement was with the object of forcing West-Cal to enter into an agreement which was prohibited by Section 8(e) of the Act in violation of Section 8(b)(4)(i) and (ii)(A) of the Act. In addition, whether Respondent Laborers' and Respondent Cement Masons' picketing of West-Cal and its subcontractor G & L Concrete at the reserved gate, set aside for neutral or secondary employers, violated Section 8(b)(4)(i) and (ii)(B) of the Act. Final determination of this issue rests on the question of whether Respondents were endeavoring to engage in a proscribed "top/down" of organizing nonunion subcontractors within in the meaning of the Supreme Court's *Connell* decision.[3]

B. *Pertinent Facts*

West-Cal is engaged in the supervision of the building of motels for California Six Motels, Inc. It has built similar motels throughout the State of California and is presently engaged in completing motels in Oregon and Sacramento, California. In this capacity, West-Cal limits its operation to the supervision of the construction of the motels. At the Sacramento jobsite, its employees were limited to John R. Norton, superintendent for West-Cal, and Timothy Alan Murphy, assistant superintendent. The president of the corporation, John Baird Norton, the father of John R. Norton, occasionally visited the jobsite. The actual construction of the building was performed by various subcontractors such as Can Am Plumbing, G & L Concrete, River City Mechanical, Ted May Construction, and Rayco Electric. Some of the subcontractors used union men, but West-Cal did not have a union agreement with any union.

West-Cal does not employ statutory employees; it employs only the superintendent and assistant superintendent at the project. It has subcontracted the entire project and has no employees performing construction work. West-Cal does not have a contract or a collective-bargaining relationship with Respondent Laborers or Respondent Cement Masons.

West-Cal commenced construction on the Sacramento motel in May 1979. It is located at the intersection of Starboard Street and Halyard Drive. A job office was located at the site which was utilized by Norton and Murphy. It is possible to enter the property either from Starboard Street (gate 1) or Halyard Drive (gate 2).

C. *The Alleged Unlawful Conduct*

On May 22, Frank Campos appeared at the jobsite and introduced himself to Timothy Murphy as the business representative for the Laborers Union. He wanted to know who was actually building the structure and who was in charge of the site. After Murphy explained that he was the assistant superintendent of the project, Campos urged him to sign the 1977–80 Laborers' Master Agreement, which he handed to him. Although Campos urged him to sign it at that time in order to make it a union job, Murphy explained that he was new and did not know the extent of his authority in such matters, therefore he would check with Norton, the president of West-Cal. No one was present during this conversation. Murphy turned the Laborers' Master Agreement over to the president on June 26. Thereafter, Campos appeared at the jobsite on a daily basis for approximately 1 week and then every other day. Although the president and Campos made several attempts to see each other, the meeting was never consummated since the president was seldom at that jobsite.

On another occasion, Campos appeared at the site near the latter part of May when he met John R. Norton, the superintendent, outside his job office. He introduced himself to Norton as the business representative for Laborers Local 185, and asked Norton who he was, who were the contractors on the job, and were they union. At this initial meeting, Norton explained that he did not in fact know the names of all the contractors nor whether or not they were, in fact, union. A few days later, they met again and Norton responded that both Can Am Plumbing and G & L Concrete would use laborers, although Norton thought that Can Am Plumbing was unionized, he was not certain as to the status of G & L Concrete. At this point, Campos insisted that he wanted his men on the job wherever laborers were needed. Norton responded that he was not responsible for hiring the laborers since this was all handled by the various subcontractors, and that if he wished to picket the jobsite, he would set up a 2-gate system in order to segregate the job from union and nonunion.

On or about June 20, Murphy observed Campos arrive at the jobsite with four men. Two of the men took positions, as pickets, at the Halyard gate and two at the Starboard gate. The men carried two different placards. The first read:

[3] *Connell Construction Company, Inc. v. Plumbers & Steamfitters Local 100, et al.*, 421 U.S. 616 (1975).

UNFAIR LABOR PRACTICES
WEST-CAL CONSTRUCTION
LABORERS LOCAL 185

The second read:

UNFAIR LABOR PRACTICES
G & L CONCRETE
LABORERS LOCAL 185

Within 3 or 4 days after the picketing began, Ohnie Oakley, the business agent of Cement Masons Union, appeared at the jobsite. Norton inquired as to why Oakley was present and he responded that he wanted his Cement Masons on the project. The picketing continued for approximately 3 weeks.

On approximately June 27, West-Cal established reserved gates at the Halyard and Starboard entrances to the project.[4] The sign which appeared on the Starboard Street entrance (gate 1) read:

THIS GATE RESERVED FOR THE
EXCLUSIVE USE OF
WEST CAL CONST. CO.
TED MAY CONST. CO.
G & L CONCRETE CO.
ALL OTHERS USE GATE 2

At gate 2 (Halyard Street), the sign read:

THIS GATE RESERVED FOR THE
EXCLUSIVE USE OF ALL CONTRACTORS,
SUBCONTRACTORS, THEIR EMPLOYEES
AND SUPPLIERS
EXCEPTION
WEST CAL CONST. CO.
TED MAY CONST. CO.
G & L CONCRETE CO.
THEIR EMPLOYEES AND SUPPLIERS MUST USE
GATE 1 ONLY

The following identical telegrams were forwarded to both Respondent Unions on June 27:

> A reserved gate system has been established at 1254 Halyard Road, a construction site in West Sacramento. Your present picketing is unlawful. Unless you cease this unlawful activity we are taking appropriate legal action against your labor organization.

Subsequent to June 21, Respondent Unions maintained the following placards at both gate 1 and gate 2:

UNFAIR LABOR
WEST-CAL CONSTRUCTION
LABORERS LOCAL 185

(and on the reverse side of the placard)

G & L—UNFAIR
DOES NOT OBSERVE
PREVAILING RATES OF
WAGES AND WORKING
CONDITIONS ON THIS JOB
CEMENT MASONS 582

At various times during the picketing, both Murphy and Norton observed the following suppliers refused to cross the picket line and deliver the supplies to the subcontractors on this site: Syar Industries, Ready-Mixed Concrete, Norpac Lumber, Georgia Pacific Lumber, Diamond International, Sierra Springwater, Amer-Cal Sanitation, and Canteen Chuck Wagon Food Service. These supplies were not for West-Cal since they were in a supervisory capacity, but were intended for the various subcontractors who were actually constructing the motel.

IV. ANALYSIS AND CONCLUSIONS

A. *Reserved Gate Entrance*

Laborers Union initiated its picketing with two men at the Halyard gate and two men at the Starboard gate on June 20. Its signs indicated unfair labor practices by West-Cal and G & L Concrete. A few days later, Ohnie Oakley, Respondent Cement Masons' business representative, visited the project and demanded that his men be used on the job. On June 21, West-Cal set up a two-gate system in order to isolate neutral employers from the labor dispute. Apparently, these reserved gates did not conform to the requirements of *Electrical Workers Local 761* v. *N.L.R.B., supra*. After consulting with their attorneys, the reserved gate signs were modified and corrected as of June 27. On the same date, West-Cal sent telegrams to the Unions informing them of the reserved gate system and that their picketing was unlawful. Although the signs clearly set out that West-Cal, Ted May Construction and G & L Concrete and their employees and suppliers could only use gate 1 (Starboard Street), and all others were to use gate 2 (Halyard Street), both Laborers Union and Cement Masons Union ignored the reserved gate signs and continued to picket both gates for 3 weeks. At all times, the integrity of the gates was maintained.

In the present case, the Laborers had a dispute with West-Cal and the Cement Masons with G & L Concrete. There were several other subcontractors also working at this same location who were required to use either gate 1 or gate 2 in order to complete their work.

A union may lawfully picket a primary employer with whom it has a legitimate dispute at a common situs so long as its conduct is consistent with that limited objective. However, it may not picket the common situs where its objective is to cause others to stop doing business with the primary employer or other persons. *Calvert General Contractors, Inc.*, 249 NLRB 1183 (1980). Therefore, when a separate gate is established to the common situs and is properly maintained for the use of the primary employer and its suppliers, the union is limited to picketing that gate. If the union pickets the neutral gate

[4] Apparently West-Cal had previously attempted to establish reserved gates at the project but these gates failed to conform to the requirement of *Electrical Workers Local 761 [General Electric Company]* v. *N.L.R.B.*, 366 U.S. 667 (1961).

reserved for other employers at the common situs, it violates the Act.

The language of the reserved gate signs and the telegrams placed the Unions on notice that they should limit their pickets to gate 1. The Respondents did not have a primary labor dispute with any employer or supplier using gate 2. As a result of their continued picketing of both gates, many suppliers refused to cross the picket lines and refused to deliver to the subcontractors who were not parties to this dispute.

Since the Unions did not have a dispute with these other subcontractors, their continued picketing of both gates was obviously an attempt to force West-Cal to sign the Laborers' Master Agreement and to do business only with subcontractors who hire union members on this project. Such conduct by Laborers and Cement Masons is a secondary boycott activity, and is prohibited by Section 8(b)(4)(i) and (ii)(B) of the Act:

> It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case, an object thereof is:
>
> > . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

On the basis of the above, and the record as a whole, I find that Laborers Union and Cement Masons Union engaged in picketing with an object of forcing or requiring secondary employers to cease doing business with West-Cal and G & L Concrete. They picketed for a period of approximately 3 weeks beginning on June 20 at both gates, including the neutral gate 2 (Halyard Street), which was reserved for subcontractors and their suppliers with whom the Unions had no dispute. Their picketing was in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

B. *Section 8(e)*

The circumstances preceding the picketing are not in dispute. West-Cal subcontracted all of the work at the Sacramento jobsite and was not responsible for the hiring or firing of any of the subcontractors' employees. Although Campos was informed of these facts, he insisted that West-Cal should require the subcontractors to hire his union laborers. Later, Oakley made a similar demand in regard to his union cement masons. Campos had also urged Murphy, as the representative of West-Cal, to sign the 1977–80 Laborers' Master Agreement. When neither Murphy nor any other representative of West-Cal would sign the agreement, the Unions initiated the picketing at both entrances of the jobsite.

As previously noted, the Laborers' Master Agreement is effective from 1977 to 1980. It contains the following provisions pertinent to this proceeding:

> Section 11–Subcontractors
>
> The terms and conditions of this Agreement insofar as it affects Employer and the individual employer shall apply equally to any subcontractor of any tier under the control of, or working under oral or written contract with such individual employer on any work covered by this Agreement to be performed at the job site or job yard, and said subcontractor with respect to such work shall be considered the same as an individual employer covered hereby.
>
> Subject to the provisions of this Section and any other Section of this Agreement applicable to subcontractors, if an individual employer shall subcontract work herein defined, such subcontract shall state that such subcontractor agrees to be bound by and comply with the terms and provisions of this Agreement.
>
> A subcontractor is defined as any person, firm or corporation who agrees under contract with the Employer, or any individual employer, or a subcontractor of the Employer, or any individual employer to perform on the job site any part or portion of the construction work covered by the prime contract, including the operation of equipment, performance of labor and installation of materials.
>
> An individual employer who provides in the subcontract that the subcontractor will pay the wages and benefits and will observe the hours and all other terms and conditions of this Agreement, shall not be liable for any delinquency by such subcontractor in the payment of any wages or fringe benefits provided herein, including payments required by Section 28 (Health & Welfare, Pension, Vacation-Holiday-Dues Supplement and Training & Retraining Funds) except as follows:
>
> The individual employer will give written notice to the Union of any subcontract involving the performance of work covered by this Agreement within five days of entering such subcontract, and shall specify the name and address of the subcontractor. Written notice at a pre-job conference shall be deemed written notice under this provision for those subcontractors listed at the pre-job only. Notification to the Union of any subcontractor not listed in writing at the pre-job must still be given in accordance with this paragraph.
>
> If thereafter such subcontractor shall become delinquent in the payment of any wages or benefits as above specified, the Union shall promptly give written notice thereof to the individual employer and to the subcontractor specifying the nature and amount of such delinquency.

If such notice is given, the individual employer shall pay and satisfy only the amount of any such delinquency by such subcontractor occurring within 75 days prior to the receipt of said notice from the Union, and said individual may withhold the amount claimed to be delinquent out of the sums due and owing by the individual employer to such contractor.

In the event the individual employer fails to give written notice of a subcontract as required herein, such individual employer shall be liable for all delinquencies of the subcontractor on that job or project without limitation.

The individual employer shall not be liable for any such delinquency if the Local Union where the delinquency occurs refers any employee to such subcontractor after giving such notice and during the continuance of such delinquency.

* * * * *

Section 9—Grievance Procedure

* * * * *

Any dispute concerning the interpretation and application of this Agreement . . . the following procedure will apply:

* * * * *

3. If said grievance or dispute is not satisfactorily adjusted by the appropriate Local Union or otherwise authorized Union Representative and the individual employer or his representative within three days after submission to the individual employer, the matter may be submitted by either party to a permanent Board of Adjustment created for the settlement of such disputes.

4. The Board of Adjustment shall be composed of two members named by the Union, two members named by the Association and an impartial Arbitrator. At any point in the proceedings should the panel be unable to reach a majority vote, the Arbitrator shall participate and his decision shall be final and binding.

* * * * *

7. Decision of the Board of Adjustment or an Impartial Arbitrator shall be within the scope and terms of this Agreement and shall be final and binding upon all parties hereto.

8. In the event an individual employer fails to comply with any such decisions, the Union may withdraw employees or strike the individual employer and such action shall not be a violation of this Agreement so long as such noncompliance continues.

* * * * *

Section 27—Employees Not to Be Discharged For Recognizing Authorized Picket Lines

No employee covered hereby may be discharged by any individual employer for refusing to cross a picket line established by an international union affiliated with the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations or a Local Union thereof, or the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or a Local Union thereof, which picket line has been authorized or sanctioned by the local Building and Construction Trades Council having jurisdiction over the area in which the job is located after the individual employer involved has been notified and has had an opportunity to be heard. Said notice shall be in writing and mailed to the individual employer involved at his last known address. This Section shall not apply to jurisdictional disputes.

MEMORANDUM AGREEMENT

It is hereby mutually understood and agreed by and between the undersigned individual employer and the Northern California District Council of Laborers for and on behalf of all affiliated Local Unions in the 46 Northern California Counties hereinafter referred to as Union that for and in consideration of services performed and to be performed by Laborers for the individual employer, the individual employer agrees to comply with all wages, hours, and working conditions set forth in the Laborers' Master Agreement for Northern California June 16, 1977, through June 15, 1980 (which agreement is incorporated herein by reference and a copy of which has been delivered to me and receipt of which is hereby expressly acknowledged), which amends, modifies, supplements, and renews each and every, all and singular previous Laborers' Master Agreements or individual employer Memorandum Agreement in the construction industry in the 46 Northern California Counties and any future modifications, changes, amendments, supplements, extensions or renewals of or to said Master Agreement which may be negotiated between the parties thereto for the term thereof.

* * * * *

Notwithstanding any provisions of the Master Agreement or this Agreement, the Union reserves the right to strike the individual employer for alleged contract violations or breach of this Agreement and such strike shall not be deemed a breach of contract by the Union. The Union at its sole option may process any alleged breach of contract through the grievance and arbitration procedures of the Master Agreement or by strike or both. Submission of any grievance involving the undersigned individual employer shall be to the permanent neutral arbitrator provided in the grievance procedure of

> the Master agreement. Claims for unpaid wages or trust fund contributions may be submitted to the labor commission at the sole option of the Union or the appropriate trust fund at anytime, in addition to any other remedy provided by the Master Agreement or this Agreement or by law . . . .

Section 8(e) of the Act prohibits unions and employers from entering an agreement by which the employer agrees to refrain from dealing in the products of another employer or to cease doing business with another person. If the Laborers' Agreement violates Section 8(e) of the Act, then the picketing which was utilized to force or require West-Cal to sign the agreement would be a violation of Section 8(b)(4)(i) and (ii)(A) of the Act. Therefore, the first question which must be resolved is whether those clauses in the Laborers' Agreement are proscribed by Section 8(e). In interpreting and applying Section 8(e), neither the Board nor the courts have concluded that Congress intended to prohibit every agreement to which it could apply. The Supreme Court, in *National Woodwork Manufacturers Association, et al.* v. *N.L.R.B.*, 386 U.S. 612 (1967), held that agreements which seek to preserve traditional bargaining unit work for unit employees by limiting or proscribing the subcontracting of that work does not fall within the prohibitions of Section 8(e), because the objectives of such clauses are primary. The Court held that the determination of whether a clause and its enforcement violated Sections 8(e) and 8(b)(4)(B):

> . . . cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.[5]

Therefore, if the clause in question provides a legitimate method by which the union can protect its traditional bargaining unit work, it is lawful as a primary interest of the union. When the clauses go beyond this primary interest of work preservation and tend to limit the employer's freedom to do business with individuals of his choice, or it inserts an element of control over the working conditions of another employer, then it is secondary and prohibited.

Section 11 of the 1977-80 Laborers' Master Agreement provides that the agreement "shall apply equally to any subcontractor" and further limits subcontracting to subcontractors who agree "to be bound by and comply with the terms and provisions of this Agreement." In a similar case, *Los Angeles County District Council of Carpenters*, 242 NLRB 801 (1979), the Board held that such subcontracting provisions constitute restrictions on doing business within the meaning of Section 8(e). In the present case, the two phrases represent "union signatory" clauses which plainly require subcontractors "to be bound by and comply with the terms and provisions of this Agreement," thus requiring subcontractors to do more than maintain union work standards.[6] As stated in *Los Angeles County District Council of Carpenters, supra*:

> The Board has found "union signatory" clauses violative of Section 8(e) because they have a secondary thrust directed at furthering general union objectives and regulating labor policies of employers other than employers party to the clauses.[7]

In addition, the Memorandum requiring the subcontractor to establish and make contributions to jointly administered health and welfare and pension funds is a union signatory clause within the meaning of Section 8(e) of the Act. A distinction is made between a clause which provides for equivalent union wages hours and which are considered the primary objectives of a union and, therefore, lawful, as opposed to a clause calling for equivalent benefits which are considered secondary objectives of a union and, therefore, in violation of Section 8(e).[8] In the present case, the clauses in question are secondary and in violation of Section 8(e) since Respondent Laborers has no legitimate interest in insisting that employees of subcontractors have health and welfare benefits equivalent or identical to those of West-Cal employees.

I find that the requirements of Section 11 are within the general proscription of Section 8(e). The remaining question is whether these clauses are privileged by the construction industry proviso of that section. The restrictions meet the express requirements of the proviso since they relate to jobsite work in the construction industry.

C. *Construction Industry Proviso*

Although Section 8(e) makes it an unfair labor practice for an employer and union to enter into an agreement, express or implied, whereby the employer agrees to cease doing business with any other person, there is a statutory exception, commonly referred to as the construction industry proviso, or proviso. The proviso of Section 8(e) provides:

> That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

Therefore, if the clause in question is found in a construction industry contract, it may be proscribed by the general provisions of Section 8(e) as having secondary objectives; however, the same clause may be privileged under the proviso.

In 1975 the Supreme Court in *Connell Construction*, 421 U.S. 616, reviewed the proviso as it related to the

[5] *Id.* at 644.

[6] See *Local 437, International Brotherhood of Electrical Workers, AFL-CIO, et al. (Dimeo Construction Co.)*, 180 NLRB 420 (1969).

[7] See *Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. (Woelke & Romero Framing, Inc.)*, 239 NLRB 241 (1978), 609 F.2d 1341 (9th Cir. 1979); *Los Angeles Building and Construction Trades Council (Donald Schriver, Inc.)*, 239 NLRB 264 (1978).

[8] See *Heavy Highway Building and Construction Teamsters, et al. (California Dump Truck Owners Association)*, 227 NLRB 269 (1976).

antitrust case. Plumbers Local 100 was the bargaining representative for workers in the plumbing and mechanical trades in Dallas, Texas. It was also a party to a multiemployer bargaining agreement with the Mechanical Contractors Association of Dallas. The agreement contained a "most favored nation" clause, which provided that if it granted a more favorable contract to any other employer it would extend the same terms to all members of the association. Connell Construction Company was a general building contractor in Dallas. It obtained jobs by competitive bidding and in turn awarded subcontracts on the sole basis of competitive bidding. As a result, it dealt with both union and nonunion subcontractors. It subcontracted all plumbing and mechanical work. Connell's employees were represented by various building trade unions. None of them were members of Local 100, and the subcontracting agreement contained the union's express disavowal of any intent to organize or represent them.

In November 1970, Local 100 picketed Connell in an attempt to force it to sign a contract under which Connell would subcontract mechanical and plumbing work only to firms that had a current contract with Local 100. The company signed under protest and then filed an antitrust suit against the union. The Court majority rejected the argument that the union's agreement with Connell was expressly authorized by the construction industry proviso to Section 8(e) and was, therefore, lawful under the antitrust laws. Although the provisions of the agreement came within the literal language of the proviso, the Court concluded that Congress intended the proviso to extend only to subcontracting agreements "in the context of collective bargaining relationships" and only to particular job sites. The Court held:

> We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.

In arriving at its decision, the Court reviewed the congressional history of the construction industry proviso, which was explained in the congressional hearings by only the bare references to "pattern of collective bargaining in the industry." The Court perceived that the proviso was enacted, in part, to overrule the effects of *N.L.R.B.* v. *Denver Building and Construction Trades Council, et al.*, 341 U.S. 675 (1951). In that case, the Court upheld the decision of the Board that by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a subcontractor employing nonunion labor on the project, the respondent labor organization committed an unfair labor practice within the meaning of Section 8(b)(4)(A) of the Act. In Justice Douglas' dissent, he points out that the basic desire and protest of union men throughout the history of the trade unions was simply to retain the freedom of not being compelled to work alongside nonunion men on the same job. Apparently, it was the desire and intent of Congress, when the proviso was ennacted, to avoid these jobsite frictions which result when union and nonmembers work "shoulder to shoulder" at a common construction jobsite.

The facts in the present case are similar to *Connell* and *Colorado Building and Construction Trades Council*, 239 NLRB 253 (1978). In the latter case, the Utilities Services Engineering Company was engaged in municipal utility industrial construction and in maintenance operations. On one of their projects, they had a contract with Johns-Manville Corporation to perform electrical maintenance work at the Johns-Manville Corporation Research and Development Center. Normally, Utilities Services did not use the services of subcontractors and did not on the Manville project. The employees of Utilities Services were not represented by any labor organization. There was never a collective-bargaining agreement between Utilities Services and the respondent labor organization. In early April, the union's business agent requested that Utilities Services sign an agreement governing the use of subcontractors on construction jobsite work and also informed them that the union would picket those who failed to sign. On April 22, the union picketed the Johns-Manville Research and Development Center site. The picket signs contained the following statement:

> UTILITIES SERVICES ENGINEERING, INC., has no subcontracting agreement with Colorado Building and Construction Trades Council.
>
> We have no dispute with any other person or company on this project.

The respondent union argued that even if their proposed clause was within the general proscription of Section 8(e), it was privileged or protected by the proviso. The Board stated:

> In *Woelke and Romero Framing, Inc.*,[9] a companion case for oral argument, we concluded that the *Connell* decision construed the construction industry proviso to Section 8(e) to permit subcontracting clauses such as that in the instant case in the context of a collective-bargaining relationship. We further noted that the *Connell* court suggested that such clauses might be protected by the proviso even without a collective-bargaining relationship if they were directed toward the problems raised by the close relationship between contractors and subcontractors at the construction site and/or to the reduction of friction that may be caused when union and nonunion employees are required to work together at the same jobsite.[10]

The Board concluded that the respondent union was seeking a subcontracting clause outside the context of a collective-bargaining relationship and thereby lost the protection of the proviso.

[9] *Carpenters Local No. 944, supra.*

[10] *Colorado Building and Construction Trades Council, supra* at 256.

In the present case, Respondent Laborers Union is a "stranger" to West-Cal. There are no bargaining agreements between the two. The Laborers does not represent anyone at the jobsite. West-Cal does not have employees at the jobsite other than two members of management, nor is there any reason to believe from the evidence that it will have such employees in the future, which might justify the clause in a prehire context under Section 8(f) of the Act.

Both the Court in *Connell* and the Board in subsequent cases have alluded the possible protection of the proviso when there is no collective-bargaining relationship if "the clause is addressed to problems posed by the common situs relationships on a particular jobsite or to the reduction of friction between union and nonunion employees at a jobsite."[11] The agreement offered by the Laborers Union is not related to the problems posed by the common situs relationship or potential friction of union and nonunion members working "shoulder to shoulder." The contract is not limited to times and places where Respondents' members would be working on the project. In general, the clauses are directed toward the interest of the Union in obtaining work and have nothing to do with the problems of common situs.

Therefore, I find that the proposed agreement was outside the context of a collective-bargaining agreement and thereby loses the protection of the proviso, thus, it violates Section 8(e) of the Act and Respondent Laborers Union's picketing to obtain the agreement violated Section 8(b)(4)(ii)(A) of the Act.

Self-Help Provisions

The General Counsel and the attorney for the Charging Party correctly assert that even if the union signatory secondary subcontracting clause contained in the 1977-80 Laborers' Master Agreement was privileged under the construction industry proviso of Section 8(e) of the Act, it would still violate Section 8(e) because of the "self help" provisions and an overly broad "picket line" clause. Accordingly, picketing to obtain such an agreement violates Section 8(b)(4)(i) and (ii)(A) of the Act.

It is settled that, "although a contract within the construction industry proviso to Section 8(e) is exempt from the proscription of that Section, it may be enforced only through lawsuits and not by threats, coercion, or restraint proscribed by Section 8(b)(4)(B)." *Ets-Hokin Corporation*, 154 NLRB 839, 840 (1965), enfd. *sub nom. N.L.R.B.* v. *International Brotherhood of Electrical Workers, AFL-CIO, Local No. 769*, 405 F.2d 159, 162-163 (9th Cir. 1968), cert. denied 395 U.S. 921 (1969). When Congress allowed certain onsite "hot cargo" agreements, it did not intend to change the law prohibiting nonjudicial enforcement of such contracts.[12] The policy underlying that proscription was based on "practical judgment on the effect of union conduct in the framework of actual disputes and what is necessary to preserve to the employer the freedom of choice that Congress has decreed." *Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, et al. [Sand Door and Plywood Co.]*, 357 U.S. 93, 107 (1958). Thus, in enacting the proviso, Congress made it clear that such an agreement could not be enforced by picketing or economic action. *Muskegon Bricklayers Union No. 5, Bricklayers, Masons and Plasterers International Union of North America, AFL-CIO (Greater Muskegon General Contractors Association)*, 150 NLRB 360 (1965), enfd. 378 F.2d 859 (6th Cir. 1967).

In the instant case, there are areas of self-help provided in the Master Agreement. In Section 9, subsection 8, the Respondent Laborers retained authority to withdraw employees from the jobsite or strike the employer if employer fails to comply with a decision arising from the grievance/arbitration provisions. A dispute arising under Section 11—*Subcontractors*—may be submitted to the grievance/arbitration procedure. In this manner, Respondent Laborers is permitted by Section 9, subsection 8, of the agreement to strike West-Cal to enforce the secondary subcontracting clause. The Board has held that such subcontracting clauses are unprivileged because they constitute means of "self enforcement" or "self help" of the subcontracting clauses.[13]

In addition, the sixth paragraph in the Memorandum of Agreement reserves the option of striking or proceeding through grievance, or both, if the employer breaches the Memorandum Agreement. Also, Section 27 provides that an employee may not be discharged for refusing to cross a picket line established by an international union affiliated with the Building and Construction Trades Department of the AFL-CIO, or a local union affiliated with the AFL-CIO, or the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or one of its local affiliates, which picket line was authorized or sanctioned by the local Building and Construction Trades Council having jurisdiction over the area in which the job is located. The General Counsel correctly contends that the clause is also unlawful under Section 8(e) of the Act since it is sufficiently broad to authorize participation by a signatory employer's employees in secondary picketing and strikes. Consequently, the Master Agreement is not entitled to the protection of Section 8(e) of the Act, and picketing to force West-Cal Construction to sign this agreement violates Section 8(b)(4)(i) and (ii)(A) of the Act.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent Unions set forth in section III, above, occurring in connection with the West-Cal's operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

[11] *Colorado Building and Construction Trades Council, supra.*

[12] *Local Union No. 48 of Sheet Metal Workers International Association* v. *The Hardy Corporation*, 332 F.2d 682 (5th Cir. 1964).

[13] *Los Angeles County District Council of Carpenters*, 242 NLRB 801 (1979).

THE REMEDY

Having found that Respondent Laborers Union has engaged in unfair labor practices in violation of Section 8(b)(4)(i), (ii)(A) and (B) of the Act, and further, that the Respondent Cement Masons Union has engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. West-Cal Construction, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Construction and General Laborers Union, Local 185, Laborers International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Cement Masons Local 582, Operative Plasterers and Cement Masons International Association, AFL-CIO, is a labor organization within the meaning Section 2(5) of the Act.

4. The agreement governing subcontracting of construction site work is one into which Respondent Unions and the Charging Party may not lawfully enter, under the provisions of Section 8(e) of the Act, by reason of self-enforcement provisions. By picketing in an effort to force West-Cal into signing this agreement, Respondent Laborers Union did coerce and restrain West-Cal and did thereby engage in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(A) of the Act.

5. By picketing for 3 weeks, beginning on June 17, 1979, at a construction site entrance, gate 2, which was reserved for subcontractors and suppliers with whom Laborers Union and Cement Masons Union had no dispute, in furtherance of a dispute with West-Cal and its subcontractor, G & L Concrete, the Unions violated Section 8(b)(4)(i) and (ii)(B) of the Act, which violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]